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July 24, 2003

**VIA HAND DELIVERY**

Ms. Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Washington, D.C. 20554

RECEIVED

24 2003

SECRETARY

**Re: *Written Ex Parte***  
**CS Docket No. 02-52 – Appropriate Regulatory Treatment for**  
**Broadband Access to the Internet Over Cable Facilities**

Dear Ms Dortch

On behalf of Cox Communication, Inc., we submit the recent decision in Parish of Jefferson v. Cox Communications Louisiana, LLC, Civ. Action No. 02-3344 (E.D. La., decision entered July 3, 2003) as a litigation update for the record in this proceeding. In Parish of Jefferson, the local franchising authority sought to impose on the Cox cable operator a 5% fee under Cox's cable franchise agreement on revenues derived from the provision of cable modem service and telecommunications service. Cox moved to dismiss these two claims.

On July 3, 2003, the U.S. District Court for the Eastern District of Louisiana rendered the attached decision, holding that the Cable Act prohibits the local franchising authority from imposing cable franchise fees on cable modem or telecommunications services. The court noted that Section 622(b) of the Cable Act caps cable franchise fees at 5% of gross revenues “derived from the operation of the cable system to provide cable services,” and held that this preempts local requirements that would impose a greater fee. The court reviewed and adopted the Commission’s ruling that cable modem service is not a “cable service” under the statute and held that, therefore, claims for cable franchise fees on revenues derived from the provision of such service (or telecommunications service) were barred under federal law.

Ms Marlene H Dortch

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Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter and enclosure are being submitted to the Secretary's office for the above-captioned docket. Should there be any questions regarding this filing, please contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David E. Mills". The signature is fluid and cursive, with the first name "David" being more prominent than the last name "Mills".

David E. Mills

Attachment

cc      W. Kenneth Ferree  
         John Rogovin  
         Barbara Esbin  
         Steve Garner (3)  
         Qualex International (2)

FILED  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

PARISH OF JEFFERSON

CIVIL ACTION

VERSUS

NO: 02-3344

COX COMMUNICATIONS LOUISIANA,  
LLC

SECTION: "R" (3)

**ORDER AND REASONS**

Defendant, Cox Communications Louisiana LLC, moves the Court for partial dismissal of plaintiff's claims for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the Court GRANTS defendant's partial motion to dismiss.

**I. BACKGROUND**

On March 27, 1990, the Parish of Jefferson and Cox Communications LLC, the successor to Cox Cable Jefferson Parish, Inc., entered into a Cable Television Franchise.<sup>1</sup> The Franchise Agreement provides that the "intent of this Agreement is to . . . set forth the standards, terms, and conditions for the continued

DATE OF ENTRY

JUL - 3 2003

<sup>1</sup>See Pl.'s Ex. A, attached to Pl.'s Pet.

Fee \_\_\_\_\_  
Process \_\_\_\_\_  
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CtRmDep \_\_\_\_\_  
Doc No 51

operation of a cable television system by The Company [Cox]  
. . . ."<sup>2</sup> Under the terms of the Agreement, Cox has the right to  
use the Parish's streets and facilities to construct and maintain  
its "System" from March 27, 1990 until October 31, 2006.<sup>3</sup> In  
exchange, Cox must pay to the Parish annual franchise fees, as  
follows:

[F]or the use and occupation of the Streets and other  
facilities of the Parish and the operation of the Cable  
Communications System a total amount equal to five (5%)  
percent of the Company's Gross Revenues for such annual  
period.<sup>4</sup>

In the Agreement, the parties acknowledge that "the Company is  
paying the Parish the maximum franchise fee percentage (five (5%)  
percent) allowed by the Cable Act."<sup>5</sup> The Agreement also includes  
a clause incorporating future legal requirements:

The provisions of this Agreement shall be construed to  
conform to all present and future requirements of the  
FCC, all acts of Congress of the United States, and all  
acts and requirements of the State of Louisiana. In the  
event future modifications to current law authorize the  
Parish to regulate rates, services or other activities of  
The Company, this Agreement shall be deemed automatically  
amended to provide for said regulation by The Parish to  
the fullest extent permissible.<sup>6</sup>

Several definitions in the Agreement are relevant. "Gross

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<sup>2</sup>See *id.* at preamble.

<sup>3</sup>See *id.* § 2.2.01.

<sup>4</sup>See *id.* § 7.1.01.

<sup>5</sup>See *id.* § 7.1.05.

<sup>6</sup>*Id.* § 12.23.

Revenue" is defined as "all receipts . . . derived, directly or indirectly, by The Company from or in connection with the operation of the System, including, without limitation: the distribution of any Service over the System; the provision of any Service Related Activity in connection with the operation of the System . . . ." <sup>7</sup> The list of sources of gross revenue in this section covers television cable service, such as basic cable service monthly fees, installation and reconnection fees, equipment rentals, and remote control rentals. <sup>8</sup> "Service" is defined as "any cable or cable related service, including, without limitation, the sale of cable programming, the publication and sale of cable programming guides, and the sale or rental of cable remote controls, . . . which is offered or provided to any Subscriber in conjunction with or distributed over the System." <sup>9</sup> "System" means the "Cable Communications System," which in turn is defined as

any facility operating by means of coaxial cable, optic fiber, or other transmission lines or otherwise, the primary function of which is to receive, through any means, . . . and to distribute the signals of one or more broadcast television or radio stations and of other sources of video, audio, voice or data signals. Said facility may also be one which distributes to, from, or among Subscribers or other Persons such other video, audio, voice, or data signals as may originate within the

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<sup>7</sup>Id. § 1.1(O).

<sup>8</sup>See id.

<sup>9</sup>Id. § 1.1(AA).

Cable Service Area or elsewhere.<sup>10</sup>

"Cable service" is not defined, but the Agreement provides that "any word or term defined in the Cable Act but not defined below shall have the meaning set forth in Section 602 of the Cable Act."<sup>11</sup> Section 602 of the Cable Act, as amended, defines "cable service" as

(A) the one-way transmission to subscribers of (1) video programming, or (11) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

47 U.S.C. § 522(6). "Telecommunications service" is not included in the definition of "cable service" under section 602, but it is defined elsewhere in the Cable Act. See 47 U.S.C. §§ 3(46) & (43).

On October 11, 2002, the Parish sued Cox in state court for breach of contract based on allegations that Cox had refused to pay, and was underpaying, various franchise fees. On November 6, 2002, Cox removed to federal court. On June 20, 2003, this Court denied plaintiff's motion to remand.<sup>12</sup> In its petition, the Parish alleges that Cox underpaid franchise fees on revenue

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<sup>10</sup>Id. § 1.1(E).

<sup>11</sup>Id. § 1.1 at preamble.

<sup>12</sup>Rec. Doc. No. 49

collected for video, audio, voice and data services."<sup>13</sup> The Parish asserts that Cox expressly agreed to pay the Parish five percent of its revenue for video, audio, voice and data signals distributed over its System, even though Cox did not provide all of those services at the time that the Contract was executed.<sup>14</sup> The Parish alleges that during the course of the contract, Cox began offering data services and, for a time, paid five percent of its revenues on data services to the Parish.<sup>15</sup> Then in April of 2002, Cox allegedly notified the Parish that it would stop paying the five percent fee for data services.<sup>16</sup> As to voice services, the Parish asserts that Cox began offering voice services in 1998 and that despite repeated demands, Cox refused to pay the Parish five percent of its revenue for voice services.<sup>17</sup> The Parish also states that Cox has underpaid franchise fees for video and audio services.<sup>18</sup>

In its partial motion to dismiss for failure to state a claim, Cox admits that it currently provides cable television service, cable modem service, and telecommunications service to

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<sup>13</sup>Pl.'s Pet. ¶ 15.

<sup>14</sup>See *id.* ¶ 16.

<sup>15</sup>See *id.* ¶ 17.

<sup>16</sup>See *id.* ¶ 18.

<sup>17</sup>See *id.* ¶¶ 20-21.

<sup>18</sup>See *id.* ¶ 23.

its customers in the Parish.<sup>19</sup> Nevertheless, Cox argues that plaintiff's claims for payment of franchise fees on cable modem service (data service) and telecommunications service (voice service) must be dismissed. First, defendant argues that while the Agreement requires payment of franchise fees on cable service, it does not call for the payment of franchise fees on cable modem or telecommunications services. In the alternative, defendant argues that even if the Agreement can be read to contemplate coverage of these services, federal law (specifically, the Cable Act), which is expressly incorporated into the Agreement, preempts contrary provisions of the Agreement and precludes plaintiff from exacting franchise fees from defendant for these services.

## **II. DISCUSSION**

### **A. Legal Standard**

In a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must accept all well-pleaded facts as true and view the facts in the light most favorable to the plaintiff. See *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *American Waste & Pollution Control Co. v. Browning-Ferris, Inc.*, 949 F.2d 1384, 1386 (5th Cir. 1991). The Court must resolve doubts as to the sufficiency of the claim in plaintiff's favor. *Vulcan Materials Company v. City of Tehuacana*, 238 F.3d

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<sup>19</sup>See Def.'s Mot. to Dismiss at 2 n.1 & 3.

382, 387 (5th Cir. 2001). Dismissal is warranted if it appears certain that the plaintiff cannot prove any set of facts in support of her claim that would entitle her to relief. *Id.*; *Piotrowski v. City of Houston*, 51 F.3d 512, 514 (5th Cir. 1995) (quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994)).

The Agreement was attached to plaintiff's petition and incorporated therein. Thus, the Court need not treat defendant's motion to dismiss as a motion for summary judgment. See *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996) (holding that in deciding motion to dismiss, courts may consider documents attached to complaint or incorporated therein).

#### **B. The 1990 Franchise Agreement**

Under the Agreement, Cox is required to pay plaintiff franchise fees at five percent of gross revenues for its use of plaintiff's rights of way. The parties dispute whether the Agreement requires Cox to pay these fees for cable modem and telecommunications service. The Court must examine several definitions in the Agreement to resolve this dispute.

"Gross Revenue" is defined as "all receipts . . . derived, directly or indirectly, by The Company from or in connection with the operation of the System, including, without limitation: the distribution of any Service over the System; the provision of any

Service Related Activity in connection with the operation of the System . . . ."<sup>20</sup> "System" means the "Cable Communications System," which in turn is defined as

any facility operating by means of coaxial cable, optic fiber, or other transmission lines or otherwise, the primary function of which is to receive, through any means, . . . and to distribute the signals of one or more broadcast television or radio stations and of other sources of video, audio, voice or data signals. Said facility may also be one which distributes to, from, or among Subscribers or other Persons such other video, audio, voice, or data signals as may originate within the Cable Service Area or elsewhere.<sup>21</sup>

The Court finds that the Agreement contemplates franchise fees on cable modem (data) and telecommunications (voice) services. First, "gross revenue" includes "all receipts" derived from "operation of the System" and it includes, but is not limited to, receipts from "cable or cable related service." Second, the definition of the "System" expressly includes operation of the facility to distribute data and voice services. Although defendant argues that the term "service," which is defined as "cable or cable related service," does not include cable modem or telecommunications services because section 522(6) of the Cable Act does not include voice service and because the FCC has recently interpreted the Cable Act not to include cable modem service, that argument misses the mark. The Agreement

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<sup>20</sup>Pl.'s Ex. A 5 1.1(0), attached to Pl.'s Pet.

<sup>21</sup>Id. 5 1.1(E) (emphasis added).

includes "all receipts" from operation of the System, and does not limit revenues to cable and cable related service.

**C. Preemption Under the Cable Act**

Defendant argues in the alternative that, even if the Agreement does contemplate franchise fees for cable modem and telecommunications services, the Cable Act preempts the Agreement and prohibits plaintiff from exacting such fees. The Court agrees.

Preemption of a common law cause of action by federal law is a question of law. See *Frank v. Delta Airlines, Inc.*, 314 F.3d 195, 197 (5th Cir. 2001). "Federal law will override state law under the Supremacy Clause when (1) Congress expressly preempts state law; (2) Congressional intent to preempt may be inferred from the existence of a pervasive federal regulatory scheme; or (3) state law conflicts with federal law or its purposes." *Id.* In a subsection entitled "Preemption," the Cable Act provides that "any provision of any franchise granted by such [franchising] authority, which is inconsistent with [the Cable Act] shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c). Thus, this case involves express preemption of state law by Congress. Further, the Agreement itself incorporates present and future requirements of federal law, including FCC rulings, and or state law:

The provisions of this Agreement shall be construed to conform to all present and future requirements of the

FCC, all acts of Congress of the United States, and all acts and requirements of the State of Louisiana. In the event future modifications to current law authorize The Parish to regulate rates, services or other activities of [Cox], this Agreement shall be deemed automatically amended to provide for said regulations by The Parish to the fullest extent permissible.<sup>22</sup>

Louisiana law prevents the Parish from imposing franchise fees prohibited under federal law:

No police jury, municipality, or other local governing authority empowered to grant cable television franchises shall charge any franchise fee of any kind in excess of that authorized by federal law.

LA. REV. STAT. ANN. 33:4461. It is clear that under federal law, state law, and the Agreement itself, the Cable Act preempts state law in this case in the event of a conflict. The question, then, is whether the Cable Act prevents the Parish from imposing franchise fees on Cox's telecommunications and cable modem services.

Before its amendment in 1996, the Cable Communications Policy Act required cable television operators to procure franchises from local municipalities and permitted local municipalities to collect as franchise fees up to five percent of the cable operators' annual gross revenues derived "from the operation of the cable system." 47 U.S.C. §§ 541, 542(b). In 1996, Congress amended the franchise fee provision to limit franchise fees to up to five percent of the cable operators'

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<sup>22</sup>Pl.'s Ex. A § 12.23, attached to Pl.'s Pet.

annual gross revenues derived "from the operation of the cable system to provide cable services." 47 U.S.C. § 542(b) (emphasis added). In the Cable Act, "cable service" is defined as

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

47 U.S.C. § 522(6). It is reasonable to conclude that the addition of new, limiting language, which does not include telecommunications services, demonstrates Congressional intent to exclude telecommunications service from the purview of the franchise fees provisions.<sup>23</sup>

The Cable Act itself corroborates this conclusion by providing a separate definition of "telecommunications service" from the definition of "cable service."<sup>24</sup> See 47 U.S.C. §§

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<sup>23</sup>The Cable Act's legislative history supports the interpretation that Congress added the restrictive language "to provide cable services" to the fee provision to limit the scope of franchise fees. See H.R. CONF. REP. 104-458 (1996), Pub. L. No. 104-104, 1996 WL 46795. Specifically, the House Conference Report states that Congress adopted the amendment to clarify that the "franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system" and that fees should be imposed on "only the operators' cable-related revenues." *Id.* This legislative history makes clear that gross revenues derived from telecommunications service were intentionally made beyond the reach of franchise fees.

<sup>24</sup>"Telecommunications service" is "the offering of telecommunications for a fee directly to the public," and "telecommunication" is "the transmission, between or among points specified by the user, of information of the user's

153(43) & (46). Further, the Cable Act expressly states that a cable operator or its affiliate which is engaged in the provision of telecommunications service does not require a franchise to do so, "and the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services." 47 U.S.C. 541(b)(3)(A). Moreover, recent case law under the Cable Act holds that cable service, telecommunications service, and information service are separate categories in the Cable Act, and regulation of any service depends on its categorization. See, e.g., *Bova v. Cox Communications*, 2002 U.S. Dist. LEXIS 12481, \*3 (W.D. Va. 2002); *GTE.Net LLC v. Cox Communications, Inc.*, 185 F. Supp. 2d 1141, 1145 (S.D. Cal. 2002). Further, the Federal Communications Commission ("FCC") recently issued a Declaratory Ruling, discussed in more detail below, in which it affirmed its prior rulings that telecommunications service is separate and distinct from information service and cable service. See *In re: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities; Notice of Proposed Rulemaking*, 17 FCCR 4798, 4820 §§ 39-41, 2002 FCC LEXIS 4534 (Mar. 15, 2002). Thus, under

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choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §§ 153(43) & (46).

principles of statutory construction, pre-FCC Ruling case law, and the FCC Ruling, it is reasonable to find that telecommunications service is a separate category of service under the Cable Act not subject to the franchise requirement or franchise fees that a municipality may impose on cable operators for cable service.

As to whether "cable service" encompasses "cable modem service," the FCC ruled in its March 2002 Declaratory Ruling that cable modem service is separate from cable service and telecommunications service. See *id.*, 17 FCCR 4798, 4818-4852, 2002 FCC LEXIS 4534. The courts that considered this issue before the FCC Ruling were split, and the United States Supreme Court has not decided the issue. See *Nat'l Cable and Telecomm. Ass'n, Inc. v. Gulf Power Co. et al.*, 534 U.S. 327, 337-39 (2002) (declining to decide whether cable modem service is cable service or telecommunications service), compare *MediaOne Group, Inc. v. Cty. of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001) (holding that cable modem service is a cable service), with *AT&T v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000) (holding that cable modem service is a telecommunications service).

These courts did not have the benefit of an interpretation of cable modem service by the FCC, which is the agency charged with interpreting the Cable Act and other federal communications

legislation. The Supreme Court has confirmed that because the FCC is responsible for interpreting federal communications legislation, its decisions on ambiguous provisions of federal communications legislation must be accepted if reasonable. See *Gulf Power*, 534 U.S. at 333, 337 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)). Further, the Supreme Court has held that "the subject matter here is technical, complex, and dynamic; and, as a general rule, agencies have authority to fill gaps where statutes are silent." *Id.* at 339 (citing *Chevron*, 467 U.S. at 843-44). The Parish does not attack the FCC's Declaratory Ruling on the grounds that it is an unreasonable interpretation of the Cable Act. Rather, the Parish argues, without citing any authority, that the FCC's Ruling should not be given effect because it is pending review in the Ninth Circuit. The effect of the FCC's Ruling is not diminished by the existence of an appeal. The taking of an appeal does not stay or otherwise invalidate the FCC's ruling. See 28 U.S.C. § 2349(b) ("The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency . . . ."). Thus, the existence of an appeal is not a reason to reject the FCC's Ruling.

After review of the FCC's Ruling, the Court adopts the FCC's interpretation of "cable modem service" as the proper

interpretation of the statute. Although the FCC's interpretation of "cable modem service" may be politically controversial, there is nothing in the record or in the Parish's briefs to support a finding that this interpretation is unreasonable on its face or in effect. The FCC concluded that cable modem service is an "interstate information service," not a "cable service" or a "telecommunications service." See *Declaratory Ruling*, 17 FCCR 4798, 4818-4852, 2002 FCC LEXIS 4534. The FCC based its Ruling on a detailed analysis of the structure and language of the Cable Act, the nature of cable modem service, and relevant legislative history. The FCC relied on its earlier findings that cable service, through one-way transmission to subscribers of video programming or other programming service, "encompasses only video delivery systems." See *id.* at 4833 ¶ 60. Based on legislative history, the FCC viewed one-way transmission to subscribers as a "medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers." *Id.* at 4833 ¶ 61. Thus, the FCC found that cable services, consisting of "one-way delivery of television programs, movies, and sporting events is not a traditional common carrier activity and should not be regulated as such." *Id.* The FCC also relied on its earlier interpretation that the term "transmission" in the definition of cable services requires "active participation in the selection and distribution

of video programming," which is controlled by the cable operator, but found that "cable operators do not control the majority of information accessible by cable modem subscribers . . . ." *Id.* at 4833 ¶ 62. The FCC also found that cable modem service does not provide video programming or other video programming service, as traditionally provided by cable service. *Id.* at 4833 ¶ 63. Finally, the FCC found that the legislative history shows that Congress did not intend for cable service to encompass the "capacity to engage in transactions or off-premises data processing, including unlimited keyword searches or the capacity to communicate instructions or commands to software programs stored in facilities off the subscribers' premises . . . ." *Id.* at 4833 ¶ 64.

On the other hand, the FCC had previously found that Internet access service is an information service because "the provider offers a single, integrated service, Internet access, to the subscriber" which combines "computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications." *Id.* at 4821 ¶ 36. Extending this analysis, the FCC viewed cable modem service as "an offering of Internet access service." *Id.* at 4821 ¶ 38. The FCC explained, "As currently provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the DNS .

. . . [It is] a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities . . . ." *Id.* Having reached these conclusions, the FCC ultimately ruled,

[ ] [C]able modem service is an interstate information service within the scope of our jurisdiction over interstate and foreign communications. We recognize, however, that it is provided over the facilities of cable systems that occupy public rights-of-way in local communities. In order to facilitate our national policy goals, we seek to clarify the authority of State and local governments with respect to cable modem service. . . . Given that we have found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined.

*Id.* at 4848 ¶ 96, 4851 ¶ 105.

These conclusions appear reasonable, and the Parish has failed to point out any error in the FCC's analysis. Rather, without addressing the impact of the FCC's ruling on its claims for franchise fees, plaintiff argues that in another amendment, Congress intended to expand, rather than narrow, the definition of "cable service." In 1996, Congress added the words "or use" to the definition of cable service so that the definition reads, ". . . subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6) (emphasis added). To support this contention, plaintiff points to a remark by Representative Dingell during the House debates, in which he said that the

"conference agreement strengthens the ability of local governments to collect fees for the use of public right-of-way," and that "the definition of the term 'cable service' has been expanded to include game channels and other interactive services." See 142 CONG. REC. H. 1145, 1156 (daily ed. Feb. 1, 1996) (remarks of Rep. Dingell)). The FCC expressly considered and rejected the "use" argument plaintiff makes:

We disagree with those cable operator and franchising authority commenters who argue that this amendment brings cable modem service within the definition of cable service. The amendment itself addresses only the use of content otherwise qualifying as cable service. . . . The legislative history relied on by commenters who favor an expansive reading of the amendment does not require the result they advocate. The Joint Explanatory Statement for the 1996 Act states: "The conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services." This statement supports an intent to permit interactivity associated with both video and other programming services provided by cable operators to subscribers. If Congress intended by the language in the Joint Explanatory Statement to broaden the meaning of cable services to include stand-alone "information services" as defined in the 1996 Act . . . the language of the statute itself does not reflect this intent.

*Declaratory Ruling*, 17 FCCR 4798, 4836 ¶¶ 65-66.

The Parish also attempts to argue that the Cable Act does not prohibit franchise fees on voice and data services in this case because issues of fact remain as to the specific amounts of gross revenue Cox derives from its various services and as to Cox's business arrangement by which it receives revenues for

telecommunications service. This argument is without merit, because such amounts and arrangements are irrelevant to the Court's finding that the Cable Act, as a matter of law, prohibits the Parish from imposing franchise fees on Cox's telecommunications service and cable modem service through the 1990 Franchise Agreement.

Finally, plaintiff argues that the FCC's ruling, if applied retroactively to its preexisting contract with defendant, would disturb plaintiff's "vested rights" and violate its due process rights by impairing plaintiff's contract. (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 11-12.) Plaintiff's argument fails on its face because the 1990 Franchise Agreement expressly provides that "the provisions of this Agreement shall be construed to conform to all present and future requirements of the FCC, all acts of Congress of the United States, and all acts and requirements of the State of Louisiana." (Pl.'s Ex. A, attached to Pl.'s Pet. § 12.23.) In fact, under the Agreement, if a future modification to existing law *benefits* the Parish, the Agreement will be automatically amended to provide for full regulation by the Parish. (See *id.*) The Parish cannot escape its contractual obligation to abide by future modifications to existing law when the modifications are unfavorable. Further, even if plaintiff's argument for impairment of contract had merit, plaintiff would have to "overcome a presumption of

constitutionality" and "'establish that the legislature has acted in an arbitrary and irrational way.'" *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 472 (1985) (quoting *Pension Benefit Gty. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)). Plaintiff has not even briefed this issue.

### **III. Conclusion**

For the foregoing reasons, the Court GRANTS defendant's partial motion to dismiss plaintiff's claims for franchise fees on defendant's telecommunications and cable modem services.

New Orleans, Louisiana, this <sup>2<sup>nd</sup></sup>~~1<sup>st</sup>~~ day of July, 2003.



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SARAH S. VANCE  
UNITED STATES DISTRICT JUDGE